INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Constitutional and Statutory Provisions Involved	2
Statement of Proceedings	2
Statement of Facts	3
Summary of the Argument	4
Argument:	
I. A search warrant under Section 595 of the Tariff Act of 1922 is void unless it is applied for and issued in compliance with the Fourth Amendment	4
II. The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause	12
III. Decisions under search warrant sections of Internal Revenue and Tariff Acts	16
IV. The evidence before the magistrate issuing the warrant must be competent and must appear in the supporting affidavits	19
V. Conclusion	22
Appendix	23–24

CITATIONS.

CASES.

Agnello *v.* United States, 290 Fed. 671	4, 8
Bookbinder *v.* United States, 287 Fed. 790	8
Boyd *v.* United States, 116 U. S. 616	5, 7, 8, 9, 10
Byers *v.* United States, 273 U. S. 28	4, 14
Commonwealth *v.* Hinds, 145 Mass. 182	5
Giles *v.* United States, 284 Fed. 208	10, 15, 21
Go-Bart Importing Co. *v.* United States, 282 U. S. 344	15
Gouled *v.* United States, 255 U. S. 298	5, 6, 10
Grau *v.* United States, 287 U. S. 124	18, 19
In re Chin K. Shue, 199 Fed. 282	19
Pappas *v.* Lufkin, 17 F. (2) 988	19
People *v.* Chiagles, 237 N. Y. 193	12

	Page
People *v.* Defore, 242 N. Y. 13	11
People ex rel. Robert Simpson Co. *v.* Kempner, et al., 208 N. Y. 16	10
Poldo *v.* United States, 55 F. (2) 866	21
Ripper *v.* United States, 178 Fed. 24	18
Schencks *v.* United States, 2 F. (2) 185	18
United States *v.* Armstrong, 275 Fed. 506	18
United States *v.* Clark, 18 F. (2) 442	19
United States *v.* Federal Mail Order Corporation, 47 F. (2) 164	18
United States *v.* Harnich, 289 Fed. 256	15
United States *v.* Lefkowitz, et al., 285 U. S. 452	6, 13
United States *v.* Maresca, 226 Fed. 713	10
United States *v.* Pitotto, 267 Fed. 603	18
United States *v.* Rykowski, 267 Fed. 866	18
United States *v.* Swan, 15 F. (2) 598	18
Veeder *v.* United States, 252 Fed. 484	15
Wagner *v.* United States, 8 F. (2) 581	17, 20
Weeks *v.* United States, 232 U. S. 383	14
Woods *v.* United States, 279 Fed. 706	18

CONSTITUTION AND STATUTES.

Fourth Amendment	4, 7, 8, 23
Act of July 31, 1789, Section 24, 1 Stat. 29, 43	8, 23
Tariff Act of 1922, September 21, 1922, c. 356, Title IV, Section 595, 42 Stat. 983 (19 U. S. C. A. 499)	1, 7, 16, 23
Revised Statutes, Section 3462 (26 U. S. C. A. 1195)	16, 24
Espionage Act, June 15, 1917, c. 30, Title XI, §2, 3 (18 U. S. C. A. 612, 613)	10, 24
Criminal Code, Section 173, February 10, 1891, c. 127, §5, as amended March 4, 1909, c. 321, §173 (18 U. S. C. A. 287)	10

MISCELLANEOUS.

In re Rule of Court, 20 Fed. Cas. #12,126, 3 Woods. 502	12
24 Op. Attys. Gen. 685	17
Cooley, Constitutional Limitations, 7th Ed., p. 427	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 39.

J. J. NATHANSON, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 18-22) is reported in 63 Fed. (2d) 937.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 1st, 1933 (R. 22). The petition for certiorari was filed April 26, 1933, and the writ granted May 29, 1933 (53 S. Ct. 792). Petitioner invoked the jurisdiction of this Court under Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether the trial court erred in refusing to exclude evidence, obtained under a warrant to search a dwelling house, issued under Section 595 of the Tariff Act of 1922, to a customs officer, upon the officer's sworn statement

that he had cause to suspect and did believe that imported liquors upon which the duties had not been paid, were deposited in the dwelling house to be searched.

Constitutional and Statutory Provisions Involved.

The Fourth Amendment to the Constitution of the United States, the pertinent provisions of the Act of 1789, of the Tariff Act of 1922, of the Internal Revenue Act and of the Espionage Act are printed in the Appendix.

Statement of Proceedings.

A criminal information was filed on or about June 11, 1930, charging that the petitioner did knowingly, wilfully and unlawfully possess intoxicating liquor in violation of Section 26 of the National Prohibition Act (R. 3 to 6). Before trial, the petitioner moved to set aside the search warrant which had been issued, to suppress the evidence obtained thereunder and for a return of the property seized (R. 1). The motion was subsequently renewed at the trial (R. 8), the court reserving decision on the motions until it had heard the testimony (R. 8).

The case then proceeded to trial before the court, a jury having been expressly waived by the defendant. At the close of the government's case the motion to set aside the search warrant and to suppress the evidence was renewed (R. 14). The motion was denied and an exception was prayed and allowed (R. 15). A motion for a directed verdict was also denied (R. 15). The court found petitioner guilty (R. 15) and sentenced him to pay a fine of $500.00 (R. 2).

Statement of Facts.

At the trial the government called as its sole witness one Francis Laughlin, a customs officer, who testified that prior to May 1st, 1930 he received information from a prohibition agent (R. 11), who told him that he and his men had seen "stuff" moved in and out of the private residence of the petitioner (R. 13). The information was also to the effect that the merchandise "was in sacks," but that the prohibition agent did not know what was in them (R. 13 and 14). The officer also testified that at the time that he applied for the search warrant he had additional information from an informer and had so told the county judge of Atlantic County to whom he applied for the search warrant (R. 14), but it does not appear that he told the judge what the information was or the name of the informer (R. 14). On the basis of the foregoing the officer made an affidavit

> "That he has cause to suspect and does believe that certain merchandise, to wit: certain liquors of foreign origin a more particular description of which cannot be given, upon which duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that certain merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a two story frame dwelling located at 117 No. Bartram Avenue, Atlantic City, N. J." (R. 10).

and upon this affidavit the county judge issued a warrant to search the dwelling house of the petitioner (R. 9).

The only evidence produced by the government was the liquor seized, and the information obtained under the search warrant.

Summary of the Argument

The Circuit Court of Appeals decided that had "this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion" (R. 19). It further held that there is a distinction between a search for intoxicating liquor under the National Prohibition Act and merchandise under the Tariff Act.

We contend that by virtue of the Fourth Amendment to the Constitution there can be no such distinction. We further contend that the search warrant was void and the evidence obtained thereunder was inadmissible for the following reasons:

1. The affidavit upon which the same was based did not contain facts from which the magistrate could find probable cause that a fraud upon the revenue was being committed at petitioner's residence.

2. There was no competent evidence before the commissioner upon which the warrant could issue.

ARGUMENT.

I.

A search warrant under Section 595 of the Tariff Act of 1922 is void unless it is applied for and issued in compliance with the Fourth Amendment.

The principles enunciated in the Fourth Amendment to the Constitution are a codification of the law as it existed prior to the adoption of the Constitution. *Agnello* v. *United States* (C. C. A.), 290 Fed. 671, 675 (rev. on other grounds). The amendment was adopted in view of the long misuse of power in the matter of searches and seizures, both in England and the Colonies (*Byers* v. *United States*, 273 U. S. 28, 33, 47 S. Ct. 248, 71 L. Ed. 520), and

established the protection against unreasonable searches and seizures as a constitutional right which Congress itself cannot violate. (*Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.)

Under the early common law the only search warrant known was that authorizing a search for stolen goods (*Commonwealth* v. *Hinds*, 145 Mass. 182), but by the time of the adoption of the Constitution the scope of search warrants had been extended. In *Gouled* v. *United States*, 255 U. S. 298, this Court held as follows (at 308):

> "The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd and Weeks Cases, supra, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law, to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed."

Although the use of search warrants was thus extended, nevertheless the common law rule that warrants may only

issue for those things in which the government has an interest, still prevails. For as Mr. Justice Clarke continues in *Gouled* v. *United States* (at 309):

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, supra, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. Boyd Case, pp. 623, 624."

A later pronouncement by this Court clearly adopting the doctrine of the Gouled case is found in *United States* v. *Lefkowitz, et al.*, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, where Mr. Justice Butler says (at 464):

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. Gouled *v.* United States, 255 U. S. 298, 310, 41 S. Ct. 261, 65 L. Ed. 647."

And at p. 465 he continues as follows:

> "The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the government, to discover property concealed to avoid payment of duties for which it is

> liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia, and illicit liquor in order to prevent the commission of crime." Citing the Boyd, Weeks, Gouled and Carroll cases.

It is thus clearly evident that a search for a man's papers to be used as evidence against him under a warrant amply supported by evidence showing probable cause, is unreasonable under the Fourth Amendment, and that therefore only searches for outlawed articles are reasonable and then only when the warrants for their seizure are "lawfully applied for, issued and executed."

It is contended by the government and determined by the Circuit Court of Appeals that a warrant may issue under the Tariff Act (*infra* p. 23) to search a dwelling upon the mere belief and suspicion of a customs officer that a fraud is being committed upon the revenue. This contention and finding claim support in the language of this court in *Boyd* v. *United States, supra,* where it is stated (at pp. 623, 624) that:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government."

The Court also relies on its previous decision in *Bookbinder* v. *United States,* 287 Fed. 790, certiorari denied 262 U. S. 748. It appears, however, that the question presented here was not urged in the petition for certiorari.

In reaching this conclusion, however, the Circuit Court of Appeals failed to distinguish between the *right* to search and the *means or method* to be used to obtain a warrant to search.

At one time there were doubts as to whether or not the right existed to issue a warrant authorizing the invasion of a man's premises to make a search for stolen goods, lottery tickets, gambling devices and the like. *Agnello* v. *United States* (C. C. A.), *supra,* at p. 617. However, as is pointed out in the *Boyd case, supra,* at p. 624, enabling statutes had been passed in England and by our own government authorizing the seizure of such articles as well as goods forfeited for a breach of the revenue laws. In fact the Act of 1789 (*infra* p. 23) was the first enactment by our government concerning seizure in aid of the revenue.

The lower court determined that, as the Act of 1922, under which the warrant in the instant case was issued, was based on the Act of 1789, passed by the Congress that proposed the first ten Amendments, the former is an exception to the Fourth Amendment and that therefore the right guaranteed to the people that "no warrant shall issue but upon probable cause supported by oath or affirmation" is of no avail to one whose house was invaded by a revenue officer armed with a search warrant obtained upon his affidavit that he suspected that a fraud was being committed upon the revenue, although it did not appear in his affidavit upon what facts he relied to reach this conclusion.

We fail to see how, in the light of the history of the Fourth Amendment and the evil which existed prior to

its adoption by the use of writs of assistance, such an exception can be valid. Such writs were issued

> "To the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'" *Boyd* v. *United States* (*supra*), at p. 625.

The only difference between the warrant in this case and a writ of assistance is the necessity for a revenue officer to apply to a magistrate for a warrant. If a search warrant can thus be issued by a magistrate merely upon the suspicion of a petty officer who does not lay before the magistrate, under oath, the facts from which probable cause can be found, the application for the warrant is only an idle formality.

Can it be validly urged, in the light of the Fourth Amendment, that such practice is possible? We submit that if the doctrine announced by the Circuit Court of Appeals were affirmed by this Court, it would lie in the power of every petty officer to obtain a warrant to enter a man's private home upon mere suspicion or even none at all. The arbitrary "I suspect" of the officer, not subject to question or contest, but measured only by his own conscience, is an evil as vicious as the other abuses which are outlawed by the Fourth Amendment.

Moreover the lower court seeks to justify such an exception by holding that merchandise held in fraud of the revenue, being in the same category with counterfeit coin etc., and therefore forfeited to the government is such that it may be seized under a warrant which does not conform to the Fourth Amendment. Yet, under Section 173 of

the Criminal Code (18 U. S. C. A. 287), it is provided that:

> "The several judges * * * may, *upon proper oath or affirmation,* * * * issue a search warrant authorizing any marshal of the United States, * * * to enter any house, store, building, boat, or other place named in such warrant, *in which there shall appear probable cause for believing* that the manufacture of counterfeit money, * * * is being carried on or practiced, * * *." (Italics ours.)

We submit that statutes authorizing the issuance of warrants to search for contraband are only enabling statutes (Gouled and Boyd cases, *supra*) and that the method of obtaining the same, unless prescribed in conformity with the Fourth Amendment, is restricted by that Amendment.

The Congress, having the power to pass legislation condemning certain articles as contraband and forfeitable to the United States, enacted the Espionage Act of 1917 (*infra* p. 24), which we submit is a codification declaratory of the common law. See *Giles* v. *United States* (C. C. A. 1) 284 Fed. 208, where the court holds (at 212) that:

> "This careful codification of search warrant law leaves little or nothing for implication either as to the extent of the power or the method of its exercise. It authorizes search and seizure of stolen and embezzled property in conformity with a practice which probably goes back to Lord Coke's time."

cf. *United States* v. *Maresca* (D. C.), 226 Fed. 713.

That Act is taken from the New York Code of Criminal Procedure (Sec. 792), *People Ex Rel Robert Simpson Co.* v. *Kempner, et al.*, 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914 D, 169, wherein it is stated:

> "A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magis-

trate. Code of Criminal Procedure, §791. It may be issued upon one of three grounds: (1) When the property was stolen or embezzled; (2) when it was used as the means of committing a felony; (3) when it is in the possession of any person with the intent to use it as the means of committing a public offense. Code Criminal Procedure §792. In each of the cases last mentioned it is provided from whom the property may be taken under the warrant.

"A search warrant cannot be issued for any purpose, except as stated. Its legitimate use is, and always has been to aid in the detection and punishment of crime. As such it has been in common use since the days of Lord Coke. It was mentioned by him in the Institutes (Book 4 pp. 176, 177). Referring to search warrants, he says, 'for Justices of the Peace to make warrants upon surmises for breaking the house of any suspect to search for felons or stolen goods is against Magna Charta.'"

As we have already argued, the right to search is confined to those articles considered contraband at common law and others declared so by statute. This however does not dispense with lawful process in all cases. Mr. Justice Cardozo, then Associate Judge of the New York Court of Appeals, speaking for that Court in *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585, at 586, succinctly declares the necessity for such process as follows:

"The People stress the fact that the weapon was contraband, a nuisance subject to destruction. * * * It did not justify the search. There is no rule that homes may be ransacked without process to discover the fruits or the implements of crime. To make such inquisitions lawful, there must be the support of a search warrant issued upon probable cause. Search even then is 'confined under our statute (Code Cr. Proc. Sec. 792) to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it as an instrument of crime' (citing cases). The warrant does not issue for things of evidential

> value merely (citing cases). What would be a wrong with a warrant is not innocent without one. To dispense with process in the pursuit of contraband is to dispense with it in the one case in which it may ever issue in the pursuit of anything. Means unlawful in their inception do not become lawful by relation when suspicion ripens into discovery."

In *People* v. *Chiagles,* 237 N. Y. 193, 142 N. E. 583, the same court held (at 584) that:

> "Search is then confined under our statute to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it as an instrument of crime."

We respectfully submit that the issuance of a search warrant under the provisions of the Tariff Act of 1922 must conform to the requirements of the Fourth Amendment and is not excepted therefrom.

II.

The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause.

A warrant is invalid unless it is issued on probable cause supported by oath or affirmation. The magistrate in determining the existence or lack of probable cause must exercise a judicial function which obviously cannot be delegated to the accuser. That such determination cannot be made in the absence of specific information is equally clear. Mr. Justice Bradley in *In Re Rule of Court,* 20 Fed. Case No. 12,126, 3 Woods. 502, while sitting as Circuit Judge, said:

> "After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers and effects against unrea-

sonable searches and seizures shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant. It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty one should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded."

The wisdom of placing the matter of issuing search warrants in the hands of persons learned in the law has been recognized since before the adoption of the Constitution, and has received approbation as recently as 1932 by this Court in *United States* v. *Lefkowitz, et al., supra*, where Mr. Justice Butler said (at p. 464):

"The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest

> certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. United States *v.* Kirschenblatt (C. C. A.) 16 F. (2d) 202, 203, 51 A. L. R. 416; Go-Bart Co. *v.* United States, *supra,* 282 U. S. 358, 51 S. Ct. 153, 75 L. Ed. 374."

In *Weeks* v. *United States,* 232 U. S. 383, where papers were seized by the United States Marshal from the defendant's home without a warrant, this Court said (at p. 393):

> "Under such circumstances, *without sworn information* and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused." (Italics ours.)

In *Byers* v. *United States, supra,* p. 4, a case involving a warrant issued on an affidavit almost identical with the one in the instant case, it was said (at p. 29):

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the Fourth Amendment and the laws of the United States. C. 30, Title XI, §§3-6, 40 Stat. 217, 228-229; c. 85, Title II, §2, 41 Stat. 305, 308. See Ripper *v.* United States, 178 Fed. 24, 26; United

States v. Borkowski, 268 Fed. 408, 410-411; United States *v.* Kelly, 277 Fed. 485, 486-489."

We also call attention to the following cases which hold that warrants based on affiant's conclusions alone are void: *Giles* v. *United States* (C. C. A.), 284 Fed. 214; *United States* v. *Harnich* (D. C.), 289 Fed. 256; *Veeder* v. *United States* (C. C. A.), 252 Fed. 414.

This Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 51 S. Ct. Rep. 153, in reversing a conviction obtained on information procured under a purported search warrant held (at page 357), that the second clause of the Fourth Amendment

> "* * * prevents the issue of warrants on loose, vague, or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. Agnello *v.* United States, 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

To summarize our contentions we quote from Judge Cooley's Constitutional Limitations (7th Ed.) page 427:

> "The history of this controversy (searches and seizures) should be read in connection with that in America immediately previous to the American Revolution, in regard to writs of assistance issued by the courts to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English

law book'; since they placed 'the liberty of every man in the hands of every petty officer.' All of these matters are now a long way in the past; but it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty. * * *

"In the first place, they (search warrants) are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place. *And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it.*" (Italics ours.)

III.

Decisions under search warrant sections of Internal Revenue and Tariff Acts.

There are very few decisions construing Section 595 of the Tariff Act of 1922 (*infra* p. 23). However, a similar provision of the Internal Revenue Act (*infra* p. 24) has been considered on numerous occasions. This provision authorizes the issuance of warrants if an Internal Revenue officer "make oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises." The various district courts and circuit courts of appeal, in construing this statute, uniformly have held that an affidavit merely tracking the statute and not setting forth facts from which probable cause can be found, is

insufficient as it is inconsistent with and contrary to the spirit of the Fourth Amendment.

The then Attorney General of the United States, considering the statute, in 24 Op. Attys. Gen. 685, decided that:

> "The section providing for the issue of these search warrants does not state all of that which must be stated in the application therefor. The Fourth Amendment to the Constitution provides that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.'"

In the case of *Wagner* v. *United States* (C. C. A.), 8 Fed. (2d) 581, the Court, in declaring void a search warrant based on an affidavit of suspicion, unsupported by facts, said at page 585:

> "Counsel for defendant in error seek to support the proposition that section 3462 is not subject to the conditions contained in the Fourth Amendment, by pointing out that a statute similar to section 3462 was passed by the First Congress of the United States prior to the adoption of the Fourth Amendment. There are several answers to such a contention: (1) Whatever the practice may have been under the old statute (Act of July 31, 1789, 1 Stat. 43, c. 5, Sec. 24), yet section 3462, having been passed subsequent to the adoption of the Fourth Amendment is presumptively subject thereto. (2) The wording of the Act of July 31, 1789, differs materially from that of section 3462, and in our opinion is not open to the construction placed upon it by counsel. (3) No authority is cited to the effect that even under the old statute of 1789 an affidavit such as is involved in the instant case was sufficient. (4) The principles enunciated in the Fourth Amendment were firmly imbedded in the common law prior to the adoption of the Fourth Amendment of the United States Constitution, and the statute of July 31, 1789, was doubtless con-

> strued and intended to be construed in accordance with those common-law principles. Cooley on Constitutional Limitations (7th Ed.) pp. 428, 429; Boyd *v.* United States, 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; Weeks *v.* United States, 232 U. S. 383, 390, 391, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177."

This case is cited with approval by this Court in *Grau* v. *United States,* to which we later refer.

The following cases uniformly hold that a warrant under the Internal Revenue statute may issue only upon an affidavit reciting facts showing probable cause. *Ripper* v. *United States,* 178 Fed. 24, 26 (C. C. A. 8th); *Woods* v. *United States,* 279 Fed. 706, 709, 710 (C. C. A. 4th); *Schencks* v. *United States,* 2 Fed. (2d) 185, 187 (App. D. C.); *United States* v. *Rykowski,* 267 Fed. 866, 868, 869 (S. D. Ohio); *United States* v. *Pitotto,* 267 Fed. 603, 604 (Ore.); *United States* v. *Armstrong,* 275 Fed. 506, 508 (S. D. Fla.). See also *United States* v. *Swan,* 15 Fed. (2d) 598, 599 (N. D. Cal.).

We respectfully submit that as the mischief aimed at by both statutes is similar, the Tariff Act must receive the same construction.

Among the cases which hold that an affidavit under the Tariff Act must contain more than an affirmation of suspicion, we find *United States* v. *Federal Mail Order Corporation* (C. C. A. 2), 47 Fed. (2d) 164, in which Judge Learned Hand, though deciding (p. 165) that

> "* * * the supporting affidavits proved beyond any fair doubt that the defendants had been smuggling Swiss watches."

stated that:

> "The warrant was issued under section 499 of title 19, of the United States Code (19 U. S. C. A. sec. 499), which had its origin in section 24 of chapter 5 of laws passed by the First Congress

(1 St. L. p. 43). This provided that if a customs officer 'have cause to suspect a concealment' of goods subject to duty 'in any particular dwelling house, store, building or other place' he might, upon procuring a warrant, search for and seize them; it was enacted by the same Congress which at the time had before it the resolution that put the Fourth Amendment before the states. Were a practice shown antedating 1789, by which it was customary to seize smuggled goods upon a showing of no more than the unsupported suspicion of a customs officer, it may well be that this should be recognized as an exception to the amendment (Den ex dem. Murray *v.* Hoboken Land Co., 18 How. 272, 15 L. Ed. 372; Boyd v. U. S., 116 U. S. 616, 623, 6 S. Ct. 524, 29 L. Ed. 746; Ownbey *v.* Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873; Corn Exchange Bank *v.* Coler, 280 U. S. 218, 50 S. Ct. 94, 74 L. Ed. 378); but, as we are not advised of any such (Wagner *v.* U. S., 8 F. (2d) 581, 585 C. C. A. 8), we cannot see how that question can here be pertinent, and may assume arguendo that more was necessary (Rice *v.* U. S., 24 F. (2d) 479 C. C. A. 1); United States *v.* Lai Chow (D. C.), 298 F. 652)."

See also *In re Chin K. Shue* (D. C.), 199 Fed. 282; *Pappas* v. *Lufkin* (D. C.), 17 Fed. (2d) 988, and *United States* v. *Clark* (D. C.), 18 Fed. (2d) 442, to which latter case we refer for the many citations therein found.

IV.

The evidence before the Magistrate issuing the warrant must be competent and must appear in the supporting affidavits.

This Court recently, in the case of *Grau* v. *United States,* 287 U. S. 124, 77 L. Ed. 68, 53 Sup. Ct. Rep. 38, decided (p. 40) that

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense

> before a jury (Giles *v.* United States (C. C. A.), 284 F. 208; Wagner *v.* United States (C. C. A.), 8 F. (2d) 581), and would lead a man of prudence and caution to believe that the offense has been committed (Steele *v.* United States, 267 U. S. 498, 504; 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made."

While it is true that the warrant in the Grau case was issued under the Espionage Act we contend that the same test must be applied to warrants issued under any other statute which authorizes them.

In the Wagner case, *supra,* the affidavit was made by an Internal Revenue Agent, who averred that he made it "upon the personal knowledge of affiant by reason of having in his possession" an affidavit made by another (naming him) from which he learned certain facts. Commenting upon this, this Court said (p. 583):

> "This, of course, was mere hearsay. Moreover, it is not clear what meaning the words 'which are known to be untax-paid' are intended to convey; whether that the status 'untax-paid' was known to Beazell, who makes the affidavit, or known to Reich, whose affidavit is referred to, or known to defendant, who is said to have had the conversation with Reich. In any event, the words quoted state, not a fact, but a mere conclusion."

It appears from the testimony in the instant case that when the customs agent made his affidavit before the Common Pleas Judge, he told the Judge that he had obtained his information from an informer but did not name him (R. 14). He also stated that the other information he received, upon which he made the affidavit was information from a prohibition agent. Undoubtedly this

is a worse brand of hearsay than that in the Wagner case, as the information there consisted of a sworn statement.

In *Giles* v. *United States, supra* p. 10 (cited with approval by this Court in the Grau case), the Court said as follows (p. 214):

> "No lawyer would have suggested and no judge would have permitted, Lordan, testifying as a witness before a jury, to say that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquor at his drug store. He would have been required to state what he saw, or heard, or smelled, or tasted; that is, to give evidence on which the jury, under instructions of the court, could determine both as to the possession of liquor, as to whether it was intoxicating liquor, and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not, in form, on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of the facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner. Such is the plain requirement of section 5, supra."

In addition to the foregoing, we call attention to a recent case in the Ninth Circuit (*Poldo* v. *United States* (C. C. A.), 55 Fed. (2d) 866) where the court (at p. 868) said:

> "The authorities are clear that the affidavit must be self-sufficient, and cannot be bolstered up by oral testimony. In United States *v.* Casino (286 Fed. 976), Judge Learned Hand said: 'For a similar reason it is not material that the other evidence is absent, which was before the commissioner and which may have induced him to deny

quashal of the warrant. While under section 16 he must decide after hearing whether on all the facts there were reasonable grounds for the warrant, that does not dispense with the necessity for allegation in the affidavits themselves, which, if true, show a self-subsisting ground for the issuance of the warrant. * * * In this respect the affidavits are like pleadings. Other corroborative evidence, no doubt, is admissible for the United States, but the original allegations must in the end be supported. Hence, if those allegations on their face be inadequate, the warrant can by no possibility be legal.'"

V.

CONCLUSION.

We submit that the lower court erred in admitting in evidence over objection and exception the articles seized under the warrant and that the conviction should be reversed.

Respectfully submittd,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel
with Petitioner.

MAX MEHLER,
On the Brief.

APPENDIX.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Act of July 31, 1789, Sec. 24, 1 Stat. 29, 43:

> "That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Tariff Act of 1922, Sept. 21, 1922, c. 356, Title IV, §595, 42 Stat. 983; 19 U. S. C. A. 499:

> "*Search-Warrants; Houses Within Ten Feet of Boundary.* If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice

of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. * * *"

Internal Revenue Act, R. S. §3462, 36 Stat. 1167; 26 U. S. C. A. 1195:

"*Search Warrants.* The several judges of the district courts of the United States, and United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that fraud upon the revenue has been or is being committed upon or by the use of the said premises."

Espionage Act, June 15, 1917, c. 30, Title XI, §2, 3, 40 Stat. 228; 18 U. S. C. A. 612, 613.

"§612. GROUNDS FOR ISSUE. A search warrant may be issued under this chapter upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

"§613. PROBABLE CAUSE AND AFFIDAVIT. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."